# Exhibit 3

ALLEN NORTON & BLUE
PROFESSIONAL ASSOCIATION

324 South Hyde Park Avenue, Suite 225 • Tampa, Florida 33606
Telephone 813-251-1210 • Facsimile 813-253-2006

February 5, 2016

***Electronically Filed via NLRB E-Filing System***

Marinelly Maldonado, Field Attorney
National Labor Relations Board, Region 12
51 SW 1st Avenue, Suite 1320
Miami, Florida 33130-1623

Re: American Sales & Management Organization, LLC (d/b/a Eulen America)
Case No. 12-CA-163435
(4231 ANB File No. 16(T))

Dear Ms. Maldonado:

The undersigned represents the Respondent, American Sales & Management Organization, LLC, d/b/a Eulen America ("Eulen America"), with respect to the charge filed by the Service Employees International Union, Local 32BJ ("Union"). The purpose of this letter is to respond to the charge on behalf of Eulen America.[1]

The Union's allegation that Eulen America terminated Freddy Gonzalez in retaliation for engaging in Union activities should be dismissed for several reasons. First, Eulen America contends that the Board is without jurisdiction in this matter as Eulen America is a derivative air carrier subject to the Railway Labor Act. Second, as to Gonzalez, at the time of his discharge, Eulen America was not aware of any Section 7 protected activity by Gonzalez. And lastly, Eulen America's decision to discharge Gonzalez from his probationary employment was based on a

[1]This statement is intended to be Eulen America's summary response to the allegations raised in the above-referenced charge. It is not intended to be an exhaustive treatment of any and all evidence that may be available to Eulen America at the time this statement was prepared, and it should not be interpreted to signify that Eulen America has completed all investigations it may wish to pursue in this matter. Further, this statement is not intended to raise all legal theories and/or defenses which Eulen America may ultimately raise in this matter. Eulen America reserves the right to alter, amend, or supplement this statement if new or additional information is alleged or discovered or for other reasons. This statement is provided to the National Labor Relations Board solely for its investigation of the above-referenced charge, and with the understanding that this matter will remain confidential and will not be disclosed for any other purpose, except as authorized by applicable law.

legitimate, non-retaliatory reason – namely, that he exhibited a pattern of absenteeism and tardiness during his probationary period. Indeed, as detailed below, Gonzalez had previously been employed by Eulen America and resigned under a threat of discharge for the very same reason.

## I. FACTUAL BACKGROUND

Eulen America provides aviation support services to various airlines at a number of domestic airports, including at Miami International Airport ("MIA"). Eulen America employs approximately 2,000 people who are stationed at airports to provide various aviation support services to air carriers and their passengers, pursuant to contracts with commercial air carriers. These services include, among other things, sky capping services, services assisting handicapped passengers, baggage loading and unloading on aircraft, and aircraft cabin cleaning services. Given the nature of its business and the industry in which it works, punctuality is crucial to Eulen America's successful operations.

Eulen America's Employee Handbook sets forth its Attendance Policy. See Exhibit One attached hereto, pp. 25-26. In relevant part, the policy states that "[a]bsences and tardiness are excusable only under exceptional circumstances. Frequent tardiness or absences may result in severe discipline, up to and including termination." Gonzalez specifically acknowledged his receipt of this policy on his first day of his employment in 2015. See Exhibit Two attached hereto.

Eulen America also makes clear to its employees at their orientation that they are subject to a 90-day probationary period. During the orientation, employees are informed that Eulen America uses this period to evaluate their performance in their new roles.

Freddy Gonzalez began his most recent employment with Eulen America at MIA on August 5, 2015. At the time of his discharge on November 5, 2015, Gonzalez was employed as a Support Services Agent. See Exhibit Three attached hereto. As a Support Services Agent, Gonzalez's primary duty was assisting passengers with boarding planes. As with most responsibilities in the air travel industry, attendance and punctuality were critical to Gonzalez's position, particularly as he was often scheduled to begin work first thing in the morning when a number of flights were arriving in a short window and staffing was often at its lowest levels.

Notably, before his hiring in August 2015, Gonzalez had previously worked for Eulen America from September 28, 2010 until March 19, 2014. Just as in 2015, his prior tenure with Eulen America ended as a result of Gonzalez's attendance and tardiness issues. More specifically, Gonzalez quit in March 2014 after being warned of potential termination for attendance and punctuality issues. See Exhibit Four attached hereto. Indeed, throughout much of Gonzalez's first period of employment with Eulen America, he was counseled and/or disciplined on a number of occasions. See Exhibit Five attached hereto.

On August 5, 2015, approximately a year and a half after Gonzalez quit as a result of tardiness and attendance issues, Gonzalez was rehired after he applied for a position and the company elected to give him another opportunity. Significantly, however, upon being rehired, Gonzalez was given clear direction from the company regarding its expectations as to attendance and punctuality, particularly in light of his prior history. Gonzalez was also notified that he would need to successfully complete a 90-day probationary period.

Notwithstanding, soon after his second period of employment with Eulen America began, Gonzalez once again began exhibiting the same tardiness and attendance issues that he exhibited during his earlier employment. See Exhibit Six attached hereto. To this end, during his tenure in 2015, Gonzalez had two occasions in which he completely failed to report to work and did not call in. Additionally, he had numerous other occasions where he was routinely tardy, including a number of instances in which he was tardy by more than 5 minutes and other instances where he was 18-20 minutes late.

As a consequence of Gonzalez's continued issues with tardiness and attendance, the company elected to discharge him at the conclusion of his probationary period on November 5, 2015. Eulen America's decision to terminate Gonzalez's employment is consistent with its customary practice of disciplining and discharging employees for repeated attendance and tardiness issues, as well as other similar issues. See Exhibit Seven attached hereto (listing all employee separations at MIA during from November 1, 2014 to the present).

Moreover, as noted above, Eulen America was not aware of any Section 7 activity by Gonzalez at the time he was discharged.

## II. LEGAL DISCUSSION

The charge in this matter asserts that Eulen America violated Section 8(a)(3) of the NLRA by allegedly discharging Gonzalez for engaging in activities protected by Section 7 of the Act. For the reasons that follow, the Union's allegation in this regard lacks merit, and the charge should be dismissed.

### A. The Charge should be dismissed because the Board lacks jurisdiction as Eulen America is a derivative air carrier governed by the Railway Labor Act.

At the outset, it should be stressed that the instant charge is due to be dismissed because the Board lacks jurisdiction over Eulen America's operations. To this end, Eulen America is not properly considered an "employer" as defined by the NLRA.

Section 2(2) of the NLRA defines an "employer" for purposes of the Act. That section specifically provides that an employer "shall not include … any person subject to the Railway Labor Act[.]" 29 U.S.C. § 152(2). Likewise, Section 2(3), which defines "employees" subject to

the NLRA, specifically excludes "any individual employed by an employer subject to the Railway Labor Act[.]" 29 U.S.C. § 152(3).

In turn, the Railway Labor Act, applicable to air and rail carriers, defines "carrier" broadly to include:

> Any company which is directly or indirectly owned or controlled by or under common control with any carrier … and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit … and handling of property transported[.]

45 U.S.C. § 151, First.

For employers who are not directly engaged in the transportation of freight or passengers, a two-part test applies to determine whether the Railway Labor Act applies: (1) whether the work performed by the entity's employees has traditionally been performed by the employees of an air carrier (the "function" test); and, (2) whether there is common ownership or control between the entity and the air carrier (the "ownership or control" test). *Air Serv. Corp.*, 33 NMB 113 (2013); *ServiceMaster Aviation Svcs.*, 325 NLRB 786, 787 (1998).

As noted above, such services include checkpoint services, security screening, cabin-cleaning services, and passenger assistance. It is beyond dispute that those functions have traditionally been performed by employees of air carriers. *Primeflight Aviation Services, Inc.*, 353 NLRB 467 (2008); *Bags, Inc.*, 40 NMB 165, 168 (2013).

Additionally, the facts in this case likewise establish common control over Eulen's operations by its partner air carriers. To this end, in determining whether an entity is controlled directly or indirectly by an air carrier, the National Mediation Board ("NMB") considers factors such as: (1) the extent of the carrier's control over the manner in which the company conducts its business; (2) access to the company's operations and records; (3) the carrier's role in personnel decisions; (4) the degree of supervision exercised by the carrier; (5) the carrier's control over training; and (6) whether the employees in question are held out to the public as carrier employees. *Bags, Inc.*, 40 NMB at 168-9.

In applying these factors, the NMB has found sufficient common control where, for example, the air carrier dictated minimum staffing and its flight schedules affected the work schedules of the derivative entity's employees, provided equipment and office space to the derivative entity, dictated the service procedures to be followed and imposed financial penalties for failing to do so, and requested that the derivative entity investigate and discipline employees on occasion. *Air Serv Corp.*, 33 NMB 272 (2006); *see also Air Serv Corp.*, 38 NMB 113 (2011).

In recent matters before the Board, Eulen America has asserted the Board's lack of jurisdiction over it and has submitted substantial evidence in support of that position.[2] Eulen America re-asserts its position in this regard and submits, as Exhibit Eight, the previously-submitted information outlining the supporting evidence.[3]

As set forth in detail in the declaration attached as Exhibit Eight, Eulen America's partner airlines exert substantial control over Eulen America's operations. To this end, Eulen's minimum staffing is often dictated by contract and subject to airline approval. Scheduling is dictated by the airlines' volume and their arrival and departure times. The carriers can, and do, require Eulen America employees to work beyond the end of their normally-scheduled shifts. Carrier approval is required to work overtime. The carriers often audit the work of Eulen America's employees and report its findings and recommendations back to Eulen America. Several carriers provide facilities and equipment used by Eulen America employees. Additionally, the air carriers have made recommendations and requests regarding disciplinary actions concerning Eulen America employees and Eulen America has complied with such requests.

All of these factors, comprehensively detailed in the attached declaration, establish that Eulen America's partner airlines exert substantial control over Eulen America's operations. Accordingly, Eulen America is subject to the jurisdiction of the NMB under the Railway Labor Act and is not subject to the jurisdiction of the Board. The instant charge should therefore be dismissed.

**B. The charge should be dismissed as Eulen America terminated Gonzalez for a legitimate, non-retaliatory reason.**

As the Board is aware, to establish a violation of the Act based on an allegation of retaliation allegedly due to an employee's union activities or sentiment, the General Counsel must first make a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision at issue. *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, 2015 WL 5047758, *3 (2015) (citing *Wright Line*, 251 NLRB 1083, 1089 (1980)). If the General Counsel can establish such a showing, the burden shifts to the employer to demonstrate that it would have taken the same action even the absence of any protected conduct. *Id.*

---

[2] See Case No. 12-CA157724 and Case No. 12-CA -113350.

[3] Exhibit Nine, the Declaration of Richard Layson, was previously submitted to the Board in Case No. 12-CA-113350. It is being submitted in this matter solely to detail the factual support for Eulen America's position that the Board lacks jurisdiction in the present case. Although that declaration outlined Eulen America's operations as it pertained to its operations at Fort Lauderdale operation, those operations are analogous to the operations Eulen America performs for its partner airlines at MIA.

As the facts above demonstrate, Gonzalez was in his probationary period at the time of his discharge, and Eulen America discharged Gonzalez due to his failure to abide by the company's Attendance Policy during this evaluation period. Furthermore, Gonzalez had previously exhibited attendance issues during his first period of employment and had been specifically instructed on Eulen America's attendance and punctuality expectations when the company elected to give him a second chance by rehiring him. Notwithstanding, Gonzalez's prior record of poor attendance and punctuality continued into his second tenure with the company and, as a result, he was discharged at the end of his probationary period.

Additionally, at the time of his discharge, Eulen America was not aware of any protected activities in which Gonzalez participated, nor was the company aware of any union sentiments Gonzalez may have held or expressed.

Accordingly, the facts in this case make it clear that Eulen America's sole reason for terminating Gonzalez's employment was because Gonzalez failed to consistently meet the company's legitimate attendance and punctuality expectations despite being given several chances, being afforded specific directives, and having previously been counseled and discipline to the point that he quit over similar concerns during his prior tenure.

## III. CONCLUSION

In view of the foregoing, we submit that the unfair labor practice charge is without merit and should be dismissed.

If you have any additional questions, please contact me.

Sincerely,

Brian Koji

Enclosures
Exhibit One: Employee Handbook
Exhibit Two: Attendance Police Acknowledgment of Receipt
Exhibit Three: November 2015 Termination Form
Exhibit Four: March 2014 Separation Report
Exhibit Five: Disciplinary Action Forms
Exhibit Six: Payroll Report with Clock in/Clock Out Information
Exhibit Seven: MIA Separations from November 1, 2014 to present
Exhibit Eight: Declaration of Richard Layson